HONG LEONG BANK BHD

v.

GOH SIN KHAI

HIGH COURT OF MALAYA, JOHOR BAHRU
SYED AHMAD HELMY J
[ORIGINATING SUMMONS NO: MT-1 24-2593-2003]
14 JANUARY 2005

LAND LAW: *Charge - Deed of assignment - Absolute assignment - Whether amounted to a transfer of legal right of chose in action from purchaser to financier - Whether an equitable mortgage - Whether extinguished upon issuance of individual or strata title - Whether financier could realize his security without registering a National Land Code charge and applying to court for an order for sale*

BANKING: *Securities for advances - Deed of assignment - Absolute assignment - Whether amounted to a transfer of legal right of chose in action from purchaser to financier - Whether an equitable mortgage - Whether extinguished upon issuance of individual or strata title - Whether financier could realize his security without registering a National Land Code charge and applying to court for an order for sale*

The plaintiff in the following application sought the following reliefs: (i) a declaration that the defendant had absolutely assigned to the plaintiff all rights and interests in a piece or parcel of property ('the said property') pursuant to a deed of assignment dated 12 September 2002 ('the DOA'); (ii) a declaration that the issuance of an individual title for the said property did not affect the validity and continuance of the aforesaid absolute assignment, and that the rights and privileges of the plaintiff as the assignee under the DOA were intact and preserved regardless of the issuance of the said individual title; and (iii) a declaration that the absolute assignment constituted an equitable mortgage of the said property to the plaintiff and by reason thereof, the plaintiff was at liberty to dispose of the said property in accordance with the agreed terms and conditions in the facilities agreement dated 12 September 2002 and DOA, regardless of the issuance of the said individual title. The core question confronting this court was whether a financier having an absolute assignment could realize his security after the issuance of an individual title, without registering a National Land Code charge and applying to the court for an order for sale.

Held (allowing the plaintiff's application):

[1] The deed of assignment in this case stated that the defendant assigned "the full and entire benefit of the sale and purchase agreement together with all rights, title and interests of the assignor(s) therein". The sale and purchase spoken of in the assignment was the sale and purchase contract between the developer and the assignor for the purchase of the property. It was evident in these transactions that the assignor had paid the full purchase price for the property to the developer utilizing the funds made available to him by the assignee. It was clear that the developer was no more than a constructive trustee in this case but he still held the legal title to the property until it was transferred, and until then, the assignor only had a right in personam, that is the contractual right or benefit accruing to him under the sale and purchase agreement. That is a right enforceable by action if unlawfully withheld by the developer and is a chose in action. Following from this, an absolute assignment in such a case amounted to a transfer of the legal right of the chose in action from the purchaser to the financier. (p 37 d-f)

[2] The law in relation to absolute assignments is clear. An absolute assignment is an equitable mortgage and the essence of a mortgage is that there is a transfer of the ownership to the mortgagee. There is no statute or rule in common law that once an individual title or strata title is issued, the absolute assignment is extinguished. Likewise, there is nothing to say that the assignee must extinguish the assignment by ensuring that the assignor takes a transfer of the property and creates a charge in favour of the lender. In the absence of any statutory provision or rule of common law, the court must give effect to the intention of the parties that is reflected in the contractual provisions of the assignment. Unless the contractual provisions in the assignment provide that it is extinguished upon the issuance of an individual or strata title, the assignment is not extinguished. Unless the assignment imposes an obligation on the assignee to ensure that the title is transferred to the assignor and a charge is registered, the court cannot impose such an obligation on the assignee in the absence of statutory power or common law enabling the court to do so. (pp 44 g-h & 45 a-c)

[3] For the reasons adumbrated above, the question of whether a lender having an assignment may, without obtaining an order of sale from the court, realize his security consisting of immovable property in respect of which there is an issue document of title but no registered charge, must be answered in the affirmative and this court accordingly made an order in terms of the declarations sought by the plaintiff. (p 46 f)

Case(s) referred to:

Che Dah & Anor v. Commissioner of Land Titles (Penang and Malacca) Penang [1973] 2 MLJ 29 ***(refd)***

Chuah Eng Khong v. Malayan Banking Bhd [1999] 2 CLJ 917 FC ***(refd)***

Jashim Scaffolding (M) Sdn Bhd v. Chew Ai Eng Sdn Bhd; OCBC Bank (M) Bhd (Applicant) [2004] 6 CLJ 497 HC ***(refd)***

Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors [1997] 3 CLJ 274 SC ***(refd)***

Kreglinger v. New Patagonia Meat and Cold Storage Co Ltd [1914] AC 25 ***(refd)***

Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449 ***(refd)***

London and County Banking Company v. Goddard [1897] 1 Ch 642 ***(refd)***

Matthews v. Goodday [1861] 31 LJ Ch 282 ***(refd)***

Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd [1985] 1 CLJ 56; [1985] CLJ (Rep) 231 FC ***(refd)***

Ooi Chin Nee v. Citibank Bhd [2003] 1 CLJ 548 HC ***(refd)***

Phileoallied Bank (M) Bhd v. Bupinder Singh Avatar Singh & Anor [2002] 2 CLJ 621 FC ***(refd)***

Re Hodson and Howes' Contract [1886] 35 Ch D 668 ***(refd)***

Re Solomon and Meagher's Contract [1888] 40 Ch D 508 ***(refd)***

Re White Rose Cottage [1965] Ch 940 ***(refd)***

Thornborough v. Baker [1675] 3 Swan 628 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 4(3), (4)

National Land Code, ss. 5, 89, 90, 91, 292(1)

Rules of the High Court 1980, O. 83

Strata Titles Act 1985, ss. 5(1), (2), 16(6), 34(1)(a)

Other source(s) referred to:

EH Burn, *Cheshire and Burn's Modern Law of Real Property*, 14th edn, pp 500, 635, 637

ER Hardy Ivamy, *Mozley & Whiteley's Law Dictionary*, 10th edn

Reported by Suresh Nathan

JUDGMENT

Syed Ahmad Helmy J:

The declarations sought by the plaintiff as per encl. 2 is for the following reliefs:

a. A declaration that the defendant has absolutely assigned to the plaintiff all rights and interest in that piece or parcel of property known as PTD 117952 in the Mukim of Pulai, District of Johor Bahru, State of Johor (hereinafter referred to as "the said property") pursuant to the deed of assignment dated 12 September 2002;

b. A declaration that the issuance of individual title for the said property does not effect the validity and continuance of the aforesaid absolute assignment and that the rights and privileges of the plaintiff as the assignee under the deed of assignment dated 12 September 2002 are intact and preserved regardless of the issuance of individual title for the said property; and

c. A declaration that the absolute assignment referred to in para. 1 above constitutes an equitable mortgage of the said property to the plaintiff and by reason thereof, the plaintiff is at liberty to dispose of the said property in accordance with the agreed terms and conditions in the facilities agreement and deed of assignment, both dated 12 September 2002, regardless of the issuance of an individual title in respect of the said property.

The declarations sought had in fact been answered by two High Court decisions in *Ooi Chin Nee v. Citibank Berhad* [2003] 1 CLJ 548 and *Jashim Scaffolding (M) Sdn. Bhd. v. Chew Ai Eng Sdn. Bhd; OCBC Bank (M) Bhd (Applicant)* [2004] 6 CLJ 497 where the court held that once strata title is issued the property must be transferred to the purchaser and the financier must register a National Land Code charge and thereafter apply to court for an order for sale pursuant to the National Land Code and O. 83 of the Rules of the High Court 1980. Learned counsel's submission is that the reasoning of the High Court decision is flawed and is not in accord with the ratio of the Federal Court decision in *Phileoallied Bank (M) Bhd v. Bupinder Singh a/l Avatar Singh & Anor* [2002] 2 CLJ 621 and ought not to be followed.

Before delving into a critical analysis of the aforesaid High Court decisions it is important to emphasize that the question of law that was posed to the Federal Court in *Phileoallied*'s case and answered affirmatively by them was "whether a lender may, without obtaining an order of sale from the court, realize his security consisting of immovable property in respect of which there is no issue document of title and no registered charge". In affirmatively answering the question the Federal Court reasoned that an absolute assignment to a financier of the rights and interest of a purchaser under a sale and purchase agreement as security for the repayment of a loan creates an equitable mortgage which enables a mortgagee to exercise his common law power of sale without the necessity of a court order.

Hence a proper appreciation of the reasoning of the Federal Court would lead to the inevitable conclusion that the Federal Court never adjudicated on the issue and is no authority for the proposition that once the issue document of title has been issued the assignee loses the power of sale he has at common law.

I shall now embark to critically examine the reasoning behind the two High Court decisions aforesaid.

Ooi Chin Nee's case involved a purchaser who bought a property from a developer through a loan taken from a financier. As security for repayment of the loan the purchaser absolutely assigned all his rights in the property to the financier. The purchaser defaulted and the financier proceeded to put up the property for sale by public auction. Before the property could be sold strata title was issued and registered in the developer's name. The purchaser applied to court for an injunction to restrain the financier from disposing off the property at the auction.

The purchaser contended that as strata title had been issued, the financier could no longer proceed with the auction. The learned judge agreed with the purchaser and held that once strata title is issued, the property must be transferred to the purchaser and the financier must register a National Land Code charge and thereafter apply to court for an order for sale. The learned judge in purported support of his conclusion referred to both the statutory provisions and the contractual provisions. The statutory provisions referred to were ss. 5(1) & (2), 16(6) and 34(1)(a) of the Strata Titles Act 1985 ("the Act") and ss. 89 to 91 of the National Land Code ("the Code").

Section 5(1) and (2) of the Act provides that the Act forms part of the Code and that the provisions of the Code applies to parcels held under strata title so long as those provisions are not inconsistent with the Act. Section 34(1)(a) of the Act states that a proprietor has in relation to his parcel the powers a proprietor of land has under the Code in relation to his land. Section 16(6) of the Act provides that ss. 89 to 91 of the Code will apply to documents of strata title as they apply to documents of final title.

Now, s. 89 of the Code provides that every register document of title duly registered will be conclusive evidence that the land described therein is vested in the person or body named therein as proprietor and of any conditions, restrictions of interest and other provisions affecting the land that are required by the Code to be specified therein. Section 90 of the Code provides that when the issue document of title is ready to be issued to the proprietor, the proprietor may be served a notice requiring him to take delivery of the document and pay any item of land revenue then outstanding in respect of the land. Finally, s. 91 of the Code states that no stamp duty has to be paid for any document of title prepared under this Chapter of the Code.

Though the sections from the two statutes relied upon by the learned judge range from the application of the Code to subdivided property to the issuance of individual title to the proprietor, with the utmost of respecy, to my mind it is not supportive of the conclusion that once individual title is issued in the developer's name, it must be transferred to the assignor and a charge registered in favour of the assignee.

Again on the contractual provision of the sale and purchase agreement the learned judge adverted to the clause requiring the developer to apply for subdivision of the building and obtain the issue of a separate strata title for the property. The clause further provided that once strata title is issued the vendor will execute a valid and registrable memorandum of transfer of the said parcel to the purchaser. In the latter the learned judge gave much pre-eminence to s. 4.05 the material parts of which as related by the learned judge appears at pp. 554-555 of the judgment as follows:

> Section 4.05:
>
> Upon the issue of separate document(s) of title to the property by the relevant governmental authorities, the assignor shall at its own cost and expense and immediately upon being so required to do so by notice in writing from the assignee ... take a transfer of the property and immediately deliver and deposit ... with the assignee ... the relevant document(s) of title and memorandum ... of transfer and all other documents together with all necessary stamp and registration fees for effecting the registration thereof free from encumbrances and shall at the assignor's own cost and expense immediately execute a statutory charge or charges in the form prescribed under the National Land Code over the separate document(s) of title to the property ... in favour of the assignee ...

It is indisputable that this clause requires the assignor to take a transfer of the property, deposit the indicia of his title with the assignee thereafter and execute a National Land Code charge for the purpose of securing the repayment of the loan facility. The clause aforesaid on a proper appraisal is to my mind nothing more than a right or privilege that is extended to the lender under a contract. The holder of the right can seek to enforce it like any other contractual right against the defaulting party. In this case, the right can be enforced by a decree of specific performance against the assignor. This is similar to the English practice in cases where the owner of land has contractually agreed to create a legal mortgage. The practice there is concisely explained in *Cheshire and Burn's Modern Law of Real Property,* 14th edn by EH Burn at p. 635, where the author states:

> Equity looks on that as done which ought to be done, and therefore if A agrees that, in consideration of money advanced, he will execute a legal mortgage in favour of B, an equitable mortgage is created in favour of B, and he can enforce the execution of a legal mortgage by suing in equity for specific performance (*Tebb v. Hodge* [1869] LR 5 CP 73).

By the same token, if an assignor refuses to execute a statutory charge once strata title is issued, the assignee, may sue for specific performance. But this is a right contractually accorded to the assignee and nothing more. It cannot be said in the face of a clear breach by the assignor that the assignee is precluded from enforcing his security until he causes a statutory charge (a superior security interest) to be created. The promise to create a statutory charge, or in the English context to create a legal mortgage, is an obligation that falls squarely on the shoulders of the assignor. There is certainly nothing in the clause produced above to suggest otherwise.

In this respect it is very relevant not to lose perspective of the essence of the Federal Court decision in *PhileoAllied Bank (M) Bhd. v. Bupinder Singh Avatar Singh & Anor* [2002] 2 CLJ 621 at p. 626 where Abdul Malek Ahmad FCJ summarized the question to be answered by the Federal Court as:

> whether a lender may, without obtaining an order of sale from the court, realize his security consisting of immovable property in respect of which there is no issue document of title and no registered charge.

The learned judge by reason of the affirmative answer to the question aforesaid by the Federal Court concluded as follows:

> In the case before me, there is an issue document of title but there is no registered charge. It is my judgment therefore that in pursuance of their contractual rights, when there is an issue document of title as in this case, the plaintiff must get the property transferred to his name and then register a charge in favour of the defendant/bank. The present conduct of the bank in proceeding with the proclamation of sale is clearly an attempt to circumvent s. 4.05 of the deed of assignment.

As I have stated above in the earlier part of my judgment herein the Federal Court decision in *PhileoAllied* is no authority for the proposition that once issue document of title has been issued, the assignee loses the power of sale he has at common law and in my view any attempt to read it as such would tantamount to a reasoning in defiance of the fundamental rule that the converse of a universally affirmative proposition is not a universally negative proposition.

It is clear that the learned judge's reasoning in *Ooi Chin Nee*'s case was premised by his equation of the absolute assignment therein to an equitable charge, and equating an equitable charge to an equitable mortgage, when in essence there is a marked difference between an equitable mortgage and an equitable charge.

The distinction between a legal or an equitable mortgage and an equitable charge was admirably explained by Kindersley VC in *Matthews v. Goodday* [1861] 31 LJ Ch. 282 which appeared on *Cheshire and Burn's Modern Law of Real Property,* 14th edn by E.H. at p. 637 and reads as follows:

> With regard to what are called equitable mortgages, my notion is this. Suppose a man signed a written contract, by which he simply agreed that he thereby charged his real estate with £500 to A, what would be the effect of it? It would be no agreement to give a legal mortgage, but a security by which he equitably charged his lands with payment of a sum of money, and the mode of enforcing it would be by coming into a court of equity to have the money raised by sale or mortgage, that would be the effect of such simple charge. It is the same thing as if a testator devised an estate to A charged with payment of a sum of money to B. B's right is not to foreclose A, but to have his charge raised by sale or mortgage of the land ... But the thing would be distinctly an equitable charge, and not a mortgage nor an agreement to give one. On the other hand the party might agree that, having borrowed a sum of money, he would give a legal mortgage whenever called upon. That agreement might be enforced according to its terms, and the court would decree a legal mortgage to be given, and would also foreclose the mortgage, unless the money was paid.

The passage above illustrates the fact that a charge is a mere hypothecation. It does not involve the transfer of ownership of immovable property. A mortgage, on the other hand, involves the transfer of ownership of immovable property to the mortgagee subject to the mortgagor's equity of redemption. An absolute assignment creates an equitable mortgage. It cannot be a legal mortgage because the legal estate is not vested in the assignor in these cases to enable him to create a legal mortgage. The legal estate to the property is vested in the developer. The fact that an absolute assignment creates an equitable mortgage has been settled by high authority, namely the judgments of the Federal Court in *PhileoAllied* as well as in *Chuah Eng Khong v. Malayan Banking Bhd.* [1999] 2 CLJ 917. An absolute assignment creates a mortgage and not a charge simply because the assignment serves to transfer to the assignee the legal right in the chose in action pursuant to s. 4(4) of the Civil Law Act 1956. This is consistent with the concept of a mortgage as opposed to a charge.

The learned judge to my mind based on the documents therein (ie, the sale and purchase agreement, the deed of assignment and the individual title) must have concluded that the absolute assignment ceased to exist once the individual title had been issue.

That must be so because the absolute assignment, as the Federal Court has decided in *PhileoAllied*, creates an equitable mortgage. Surely, both an equitable mortgage and an equitable charge cannot co-exist based on the instrument creating an absolute assignment since both mortgage and charge are in essence quite different. Since the assignment creates an equitable mortgage, in order for an equitable charge to have come into existence when an individual title was issued, the assignment must have been extinguished. This leads to a dangerous state of affairs that can have far-reaching implications on the banking sector. If the assignment is extinguished by the mere fact that a strata title has been issued, the assignor would be in a position to deal with the property and the financier's security is at risk. There is no basis in law to my mind for concluding that the issuance of an individual title has the effect of converting the existing equitable mortgage into an equitable charge. The equitable mortgage and the absolute assignment continue to subsist even after the issuance of an individual title.

Ooi Chin Nee's case was followed by *Jashin Scaffolding* where the learned judge had this to say in relation to cases where individual or strata titles are issued, the relevant passages of which appearing at pp. 507 and 508 are reproduced as follows:

> The court realizes that in such a situation, the applicant has no other option but to create the proposed charge. In this respect the court fully agrees with Justice RK Nathan in the case of *Ooi Chin Nee v. Citibank Bhd.* [2003] 1 CLJ 548 ... The respondent has no rights to deal with the said property yet as it is not the registered owner and the respondent only has the contractual rights of specific performance against the Developer and Messrs. Brilliant Profile Sdn. Bhd. to effect the transfer of the said property to the respondent. Until and unless the said property is transferred and registered in the respondent's name, the respondent only has beneficial rights in the said property. The same applies to the applicant despite the existence of the said deed of assignment in the applicant's favour. As such, the applicant cannot realize or dispose of the said property by way of public auction ...

Though *Ooi Chin Nee*'s case was followed nevertheless the statutory ground relied upon by the learned judge was different as evident by his reliance on s. 292 of the National Land Code.

A close scrutiny of s. 292(1) of the National Land Code gives a list of instruments capable of being registered under the Code. The registrar has no discretion to register any instrument that is outside the scope of purview of this section. This was decided in *Che Dah & Anor v. Commissioner of Land Titles (Penang and Malacca) Penang* [1973] 2 MLJ 29. Now, s. 5 of the National Land Code defines "dealing" with or in respect of land as any transaction with respect to alienated land effected under the powers conferred by Division IV, and any like transaction effected under the provisions of any previous land law, but does not include any caveat or prohibitory order. The only transactions listed in Division IV are transfers, leases and tenancies. Part 13 of Division IV contain provisions relating mainly to instruments of dealings, which are later presented for registration pursuant to s. 292 of the Code. Hence the learned judge was right to conclude that only the developer has the right to deal with the property since after sub-division of the master title, individual titles would be issued with the developer registered as the owner of each parcel to which the individual title relates. Essentially, that means only the developer may effect a transfer of the property under Part 14 of Division IV of the Code since the bare legal title still vests in the developer.

The learned judge also correctly held that the purchaser in those circumstances could seek the equitable remedy of specific performance against the developer pursuant to his contractual rights under the sale and purchase agreement. The learned judge's reasoning unfortunately stops short of distinguishing between cases where the chose in action has not been absolutely assigned to another and cases where it has been so assigned. For in the former case, the purchaser is still vested with the chose, which are the rights accruing to him under the sale and purchase contract and as such, could seek the relief of specific performance to compel the transfer of the property to him. But in the latter, the legal right to the chose in action has been absolutely transferred to the assignee and the only way in which the purchaser could possibly take a transfer from the developer is if the assignee reassigns the chose to the purchaser. It follows that when the assignee exercises the power of sale to dispose of the chose, it clearly falls outside the ambit of a "dealing" with or in respect of land within the meaning assigned to that term by the Code. The disposal of the chose by another assignment merely amounts to the transfer of the legal right to it to another, and the purchaser gains the contractual right to enforce against the developer the transfer of the property to him through a decree of specific performance.

Likewise, if a purchaser buys a property from a developer without any financing and prior to the issuance of an individual title, contracts to sell the property to another, the first purchaser will have to execute an assignment in favour of the second purchaser. That assignment cannot by any stretch of

imagination be termed a "dealing" with or in respect of land within the meaning of the Code. It only serves to transfer and vest in the second purchaser the rights and interest of the first purchaser under the sale and purchase agreement with the developer. Simply put, the assignment serves to transfer the legal right to the chose from the first purchaser to the second purchaser. The second purchaser acquires, as a result of the assignment, the contractual rights of the purchaser under the original sale and purchase agreement with the developer, which he can then enforce against the developer by a decree of specific performance to compel the transfer of the property to him when an individual title is issued. It cannot be gainsaid that the same must be the case when an assignee exercises the power of sale to dispose of the legal right to the chose in action. The issuance of an individual title registered in the developer's name prior to the assignee disposing the chose does not restrict or eradicate the assignee's right to transfer the chose.

Consequently to my mind there is nothing in s. 292 of the National Land Code that supports the proposition that once an individual title has been issued an assignee cannot exercise his power of sale and transfer the chose in action under the original sale and purchase agreement to another.

In respect of case law, the learned judge in *Jashin Scaffolding* also referred to the Supreme Court case of *Lian Keow Sdn. Bhd. (In liquidation) & Anor v. Overseas Credit Finance (M) Sdn. Bhd. & Ors* [1988] 2 MLJ 449 to support his finding. However on a close scrutiny the decision in *Lian Keow* is consistent with the position that the assignee can transfer the chose in action regardless of the issuance of an individual title. In *Lian Keow,* Syed Agil Barakhbah SCJ distinguished the exercise of jurisdiction in personam and in rem. His Lordship said:

> Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right *in personam*, ie, he acquires the right to the land as against the vendor personally but not good against the whole world. However, upon registration in accordance with the Code in his name, the vendor acquires a right *in rem* ... Prior to registration of the title, the statutory form of transfer under the Code gives a title in equity to the purchaser until registration. The vendor is said to hold his proprietary interest as a constructive trustee.

This passage from *Lian Keow* reveals that a vendor who has received full payment of the purchase price of land holds his proprietory interest as a constructive trustee pending transfer of title to the purchaser. The purchaser, who has performed his end of the bargain, until the transfer is registered, acquires only a right *in personam*. That right *in personam* is the chose in action that has been transferred through an absolute assignment under s. 4(3) of the Civil Law Act 1956 to the assignee. There is nothing in the judgment

of the Supreme Court that suggests that the chose that has been transferred cannot subsequently be transferred in similar fashion once an individual title is issue. On the contrary, the chose in action which gives rise to the right in personam can be transferred in the manner provided in s. 4(3) of the Civil Law Act 1956. Consequently, the passage from *Lian Keow* reproduced in the judgment in *Jashin Scaffolding*, with respect, does not in my humble view support the conclusions the learned judge arrived at in that case.

Coming back to the core question of whether a financier having an absolute assignment may realize his security even after the issuance of an individual title, it is only appropriate to advert to the factual matrix herein to ascertain the subject matter of the assignment herein, the nature of the assignment (ie, whether it is an absolute assignment) and its legal effect. In the course of ascertaining the same a brief background of the English law of mortgages and the effect of a sale by an assignee will be alluded to give clarity.

On the nature of the assignment namely whether it is absolute or not is to be determined from the instrument creating the assignment. This has been settled by our apex court in *Nouvau Mont Dor (M) Sdn. Bhd. v. Faber Development Sdn. Bhd.* [1985] 1 CLJ 56; [1985] CLJ (Rep) 231. In that case, the appellant purchased a shop office unit from a developer and to finance the purchase, obtained a fixed loan from a bank. The purchaser executed a loan, agreement. An assignment was also executed in favour of the bank, to which the developer consented. Subsequently, the developer sold the respondent the entire complex except for those shop units that had already been sold. Sometime in 1982, the appellant filed an originating summons against the respondent seeking certain declarations. The assignment favouring the bank was only revoked in 1983 after the appellant settled the loan.

At the hearing of the summons, the respondent raised a preliminary objection that at the time the summons was filed, the appellant lacked the capacity to maintain the action in its name having regard to the assignment in favour of the bank subsisting at the time. George Seah FJ delivering the judgment of the Federal Court in the case said:

> Whether or not an assignment is an absolute one (not purporting to be by way of charge only) within the meaning of s. 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself.

In *Nouvau Mont Dor*, the Federal Court considered the effects of several clauses in the assignment, primarily cl. 1 therein, which provided:

> That in consideration of the Bank having agreed to grant the loan the assignor as beneficial owner hereby assigns absolutely to the Bank all his rights title and interest in and to the said property and under the said Sale Agreement and the full benefit granted thereby and all stipulations therein contained and all remedies for enforcing the same.

Having considered this clause and the instrument creating the assignment as a whole, George Seah FJ held:

> The instrument clearly purported and was intended in point of form, to be an absolute assignment because of the use of the word "absolutely" in Clause 1 thereof (see Fry LJ in *Comfort v. Betts (supra)* at page 740).

The assignment document herein is the deed of assignment, the opening lines of Section 2.01 therein states that "the Assignor(s) hereby absolutely assign(s) to the Lender the Said Property and the full and entire benefit of the Sale and Purchase Agreement together with all rights, title and interests of the Assignor (s) therein". Applying the principles the Federal Court endorsed in *Nouvau Mont Dor*, the use of the words "absolutely assign(s)" in this section of the deed of assignment demonstrates that the instrument was intended in point of form to be an absolute assignment.

This fact is further exemplified in section 3.01 of the deed, which provides that the assignor occupies the property "merely as a licensee of the lender and by no other right". The assignee, having received an absolute assignment of all rights and interest in the property, is now in the position to grant a contractual licence to the assignor to occupy the property. The essence of a license is that the licensee neither has any legal estate nor an interest in the land, and the licence itself likewise does not confer any legal estate or interest on the licensee. In *Cheshire and Burn's Modern Law of Real Property*, 14th edn, by EH Burn at p. 500, the author explains the concept of a licence as follows:

> A licence is created in favour of B if, without being given any legal estate or interest, he is permitted by A to enter A's land for an agreed purpose. It is an authority that justifies what would otherwise be a trespass.

A licensee clearly does not have any legal estate or interest in the land. He is merely permitted to enter the land for a specified purpose. If the licensee enters the land without the licence, he would be a trespasser and liable to be prosecuted as such. It is evident then that it was the intention of the parties in this case for all rights, interest and title in the property to be absolutely assigned and transferred to the assignee. It is only in such circumstances that the grant of a licence to the assignor can be reconciled with the fact that the assignor was once the legal or beneficial owner of the estate.

Turning to the subject matter of the assignment it is only appropriate to allude first to s. 4(3) of the Civil Law Act 1956 to discover what may be assigned thereunder. That section provides, *inter alia*, that:

> Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor ... shall be effectual in law ... to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same ...

It is patently clear that an absolute assignment within the meaning of s. 4(3) of the Civil Law Act 1956 can only relate to any debt or other legal chose in action. A chose in action is a thing of which a person has not the present enjoyment, but merely a right to recover it (if withheld) by action (see *Mozley & Whiteley's Law Dictionary*, 10th edn, by E.R. Hardy Ivamy).

The deed of assignment in this case states that the defendant assigns "the full and entire benefit of the sale and purchase agreement together with all rights, title and interests of the assignor(s) therein". The sale and purchase spoken of in the assignment is the sale and purchase contract between the developer and the assignor for the purchase of the property. Now, it is evident in these transactions that the assignor has paid the full purchase price for the property to the developer utilizing the funds made available to him by the assignee. It is clear from Lian Keow that the developer is no more than a constructive trustee in this case, but he still holds the legal title to the property until it is transferred. Until that transfer takes place, the assignor only has a right *in personam*, that is the contractual right or benefit accruing to him under the sale and purchase agreement. That is a right enforceable by action if unlawfully withheld by the developer and is a chose in action. Following from this, the absolute assignment in these cases amounts to a transfer of the legal right of the chose in action from the purchaser to the financier. Thus the question arises what is the effect of an absolute assignment under Malaysian law?

In *Chuah Eng Khong v. Malayan Banking Bhd* [1999] 2 CLJ 917, the borrower borrowed RM60,000 to pay the purchase price of some lands. The borrower executed a loan agreement, which evidenced the sum borrowed, and also the terms and conditions on which the lender granted the loan. Through the loan agreement, the borrower also assigned to the lender all his rights, interest and title in the lands as security for the loan. The Federal Court held that an absolute assignment under such circumstances amounts to an equitable mortgage. Peh Swee Chin FCJ delivering the judgment of the Federal Court said:

> At common law and under the relevant rules of equity, the said loan agreement would amount to an equitable mortgage because the assignment of the right, title and interest in the said land was expressly or obviously for the purpose of securing the loan given to the borrower to purchase the said land. ... We have the loan, the contractual right to repay or to redeem the said land and the assignment of all "right title and interest" in the land pending the exercise of the contractual right to redeem. The said loan agreement, therefore, at common law, will be a mortgage. It would be an equitable mortgage (and not a legal mortgage) because the borrower at the time of signing the said loan agreement had no legal estate (or registered proprietorship of a grant of land etc.) but only an equitable interest as a purchaser by contract from a housing developer, pending the issuance of a separate document of title aforesaid."

The Federal Court in *Chuah Eng Khong* concluded that a loan agreement cum assignment is a common law mortgage if three conditions are satisfied. The conditions are, firstly, that there must be a loan, secondly, there must be an assignment of all rights, title and interest in the land as security for the repayment of the loan, and thirdly, there must be a contractual right to repay and redeem the land that had been assigned. But this leads to the question whether a common law mortgage can exist in Malaysia in view of the National Land Code. On this point, Peh Swee Chin FCJ said:

> The use of the word "mortgage" may sound like sacrilege in view of the presence of the Code which does not use the word ... The Court of Appeal used the words "equitable mortgage" in relation to the security transaction without restrain and totally without any inhibition in the face of the National Land Code. We support such usage.

The Federal Court supported the use of the phrase "equitable mortgage" in our Torrens system of land registration regardless of the fact that the National Land Code does not make any reference to the possibility of creating such a security interest in land. A different panel of the Federal Court has recently endorsed again the concept of an equitable mortgage in our system of land law in the case of *PhileoAllied Bank (M) Bhd. v. Bupinder Singh a/l Avatar Singh & Anor* [2002] 2 CLJ 621.

The fact that an absolute assignment in these cases creates an equitable mortgage is beyond doubt as the highest tier of the judiciary has endorsed this not once but twice. Although the distinction between a mortgage and a charge was pointed out earlier, greater analysis into the concept of a mortgage is required since it is new to our system of land law in the sense that it has not often come up for judicial consideration. Peh Swee Chin FCJ recognized this in *Chuah Eng Khong* when his Lordship commented, "Further investigation into the legal position of a mortgage in this country is required".

Bearing this in mind, it is ideal to briefly consider the English position on mortgages in order to provide a source for comparison with Malaysian position.

A Brief Background On The English Law Of Mortgages

A mortgage started of at common law as a mere pledge, under which the lender could enter into possession of the land and collect the rents and profits in discharge of both the principal and interest on the loan. The mortgage could either take the form of vivum vadium or mortuum vadium. A vivum vadium, that is a living pledge, discharged the entire debt from the rents and profits accruing from the land. A mortuum vadium, or a dead pledge, did not result in the extinction of the debt since the rents and profits of the land would be used to discharge only the interest on the loan.

Subsequently, a mortgage became a species of estate. The land was conveyed in fee simple to the mortgagee on condition that if the loan was repaid on the agreed day, the conveyance would be defeated and the mortgagor would be free to re-enter the land. If, on the other hand, the mortgagor failed to repay the debt on the agreed day, the mortgagee's estate would become absolute and the mortgagor's interest in the land would be extinguished. The fee simple in land represents, in English law, the most absolute interest that a man can possess in land (see *Mozley & Whiteley's Law Dictionary*, 10th edn, by E.R. Hardy Ivamy). In the Malaysian context, this interest must be the registered title to land (see the judgment of Syed Agil Barakhbah SCJ in *Lian Keow*).

The requirement that the mortgagor must repay the loan on the exact date fixed or forever lose the right to redeem his property was a hard rule. The fact that the debt remained despite the forfeiture of the land to the mortgagee made it even more difficult for the rule to withstand the scrutiny of equity. This led Lord Nottingham to say in *Thornborough v. Baker* [1675] 3 Swan 628 that:

> In natural justice and equity the principal right of the mortgagee is to the money, and his right to the land in only as a security for the money.

Hence, the courts of equity established the rule that a mortgagor must be allowed to redeem his fee simple on his failure to repay the loan on the appointed day. Time was not the essence of the contract in these cases. Thus, the legal position was altered to allow for a common law and an equitable right to redeem. The former arises contractually if redemption is effected on or before the agreed date for repayment. The latter arises when that agreed date passes without repayment. This equity to redeem past the contractual date is, however, different from the equity of redemption. The former only means that the mortgagee cannot forfeit the mortgagor's fee simple merely because repayment was not made on the contractually agreed date. The latter, however, is an equitable estate or interest in the land that a mortgagor acquires as soon

as the mortgage is created. Lord Parker explained this fundamental distinction between the two in *Kreglinger v. New Patagonia Meat and Cold Storage Co. Ltd* [1914] AC 25 as follows:

> The equity to redeem, which arises on failure to exercise the contractual right of redemption, must be carefully distinguished from the equitable estate, which, from the first, remains in the mortgagor, and is sometimes referred to as equity of redemption.

In English law, a legal mortgage is created by the conveyance of the legal estate, whether a fee simple or a term of years, to the mortgagee. Hence, when the mortgagee exercises the power of sale, he is able to convey the legal estate in the land to the purchaser. This is not the case in an equitable mortgage. In an equitable mortgage, only an equitable estate is conveyed to the mortgagee. Since the equitable mortgagee is not vested with the legal estate, he is consequently unable to convey the legal estate to a purchaser when exercising the power of sale. It is common therefore in cases of an equitable mortgage to insert a power of attorney or declaration of trust to enable the mortgagee to deal with the legal estate. In this regard, *Cheshire and Burn's Modern Law of Real Property,* 14th edn, by EH Burn at p. 635 states:

> Although a mortgage is an interest in land, and therefore not enforceable in the absence of a written memorandum or an act of part performance, it has been held, since the case of *Russel v. Russel* [1783] 1 Bro CC 269 in 1783, that an equitable mortgage is created by the delivery to the lender of the title deeds relating to the borrower's land, provided that it is intended to treat the land as security. ...
>
> In practice, however, the borrower usually signs a memorandum executed as a deed contemporaneously with the delivery of the deeds, for such a memorandum makes the transaction a mortgage by deed within the meaning of the Law of Property Act 1925, and entitles the equitable mortgagee to exercise all the powers, including the power of sale, given by the Act. But since an equitable mortgagee cannot convey the legal estate to a purchaser, it is usual to insert a power of attorney or a declaration of trust, or both, in the memorandum, so as to enable the mortgagee to deal with the legal estate.

The view the learned authors have expressed has its genesis in *Re Hodson and Howes' Contract* [1886] 35 Ch D 668. In that case, the mortgagor was the owner in fee of a freehold house. By a deed, he chargedthe house with payment to the mortgagee of a certain debt and agreed to execute a legal mortgage when required. The deed also declared that if the mortgagor defaulted, the power of sale and all other powers conferred on a mortgagee by deed under the Conveyancing and Law of Property Act 1881 would be exercisable by the mortgage. The mortgagee later entered into a contract to

sell the house to the respondent. An objection was later taken on the ground that the vendor had no power to convey the legal estate to the respondent. There was an equitable mortgage in this case because there was an. agreement to execute a legal mortgage when required. At first instance, North J held that the mortgage could only convey the estate that was in him and nothing beyond that. The learned judge said:

> What is subject to the mortgage is the equitable estate and interest vested in the mortgagee. He can convey all he has; but he cannot convey the legal estate.

On appeal, the Court of Appeal agreed with the court of first instance. The Court of Appeal found that the Conveyancing and Law of Property Act 1881 only permitted the mortgagee to convey the estate vested in him and nothing more. Cotton LJ delivering his judgment in the appeal said:

> Now if this mortgage deed, which does not deal with the legal estate, had in terms conferred a power of sale, that power would only have enabled the mortgagee to dispose of the equitable estate.

It is interesting to note that prior to the Conveyancing and Law of Property Act 1881, Lord Cranworth's Act permitted an equitable mortgagee to convey the legal estate to a purchaser. This much is clear in *Re Solomon and Meagher's Contract* [1888] 40 Ch D 508. In that case, the mortgagor was the owner in fee of a piece of land, which he charged by deed of equitable mortgage with the payment of a debt accruing from a loan. The deed contained an agreement that the mortgagor would execute a legal mortgage in favour of the lender, with a power of sale and all other powers usually contained in mortgages. The mortgagee later contracted to sell the land in exercise of the power of sale conferred on them by s. 11 of Lord Cranworth's Act. The purchaser accepted the title but required the mortgagor to agree to the conveyance. The mortgagee took out a summons to determine whether as equitable mortgagee by deed of freehold property, they could convey the legal estate to the purchaser. North J, delivering judgment in the case, said:

> The present case is very simple. The mortgagor was the absolute owner in fee. He made an equitable mortgage of the whole fee; the only question is whether the mortgagee, who have exercised the power of sale given them by statute, can themselves convey the legal estate in fee. I do not see any difficulty or danger in a case of this sort holding that the Act means what it says. ... In the present case, there are simple words to which I must give some meaning. I do not see what I can do except decide that the equitable mortgagees can convey whatever estate was in the mortgagor at the date of the mortgage.

Due to the fact that the wording of the relevant sections of Conveyancing and Law of Property Act 1881 were markedly different from the sections in earlier statute, that is Lord Cranworth's Act, the court in *Re Hodson and Howes' Contract* could no longer hold that an equitable mortgagee could convey the legal estate to a purchaser. Powers of attorneys or declarations of trust were thus employed as in *London and County Banking Company v. Goddard* [1897] 1 Ch 642 to enable the equitable mortgagee to convey the legal estate. The Conveyancing and Law of Property Act 1881 has been replaced by the Law of Property Act 1925, which again employs different language with regards to a mortgagee's power of sale. Lord Denning MR, in relation to the power of the equitable mortgagee to convey the legal estate under the present statute, found that *Re Hodson and Howes' Contract* was no longer authority on the point. In *Re White Rose Cottage* [1965] Ch 940, his Lordship said:

> I see no reason why a mortgagee, exercising his power of sale, should not be able to convey the legal estate. We were referred to *Re Hodson and Howes' Contract*, but that was a case under s. 21 of the Conveyancing and Law of Property Act, 1881. The wording of s. 104(1) of the Law of Property Act, 1925, is different. I do not regard *Re Hodson and Howes' Contract* as authority under the Act of 1925.

The position in English law with regards to this part of mortgages, consequently, is that a mortgagee may only convey to a purchaser the estate that is vested in him for the time being and nothing more. Thus if the mortgagor has transferred the legal estate to the mortgagee, the mortgagee may convey the legal estate to a purchaser. On the other hand, if the mortgagee had nothing more than the equitable estate, he may not convey the legal estate unless he has a power of attorney or the mortgagor has declared that he holds the legal estate on trust for the mortgagee.

The Effect Of A Sale By An Assignee

It is an important feature of all three English cases referred to earlier that the mortgagor was the owner in fee. Having the fee simple in the property, the mortgagor in those cases granted an equitable mortgage of the property while retaining in himself the legal estate. When compared with what happens in a case such as this one where there is an absolute assignment, there is a stark contrast. Although in the Malaysian context a security transaction involving an absolute assignment creates an equitable mortgage, the assignor (mortgagor) does not himself have the legal estate in the land unlike in the English cases referred to above. That legal estate is in the name of the developer. Even when an individual title is issued, the legal estate is with the developer until and unless a transfer is registered.

In order to convey the legal estate to a purchaser in the English law, the mortgagee must have either a power of attorney or a declaration of trust. Without either, it is impossible for the mortgagee to convey the legal estate to a purchaser since that estate remains with the mortgagor. In the local context, however, when the mortgagee exercises the power of sale under an assignment, he does not seek to convey the legal estate in the property to the purchaser. He only conveys the equitable estate to the purchaser. This is accomplished by transferring the legal right to the chose in action absolutely to the purchaser through another absolute assignment.

Having agreed that a loan agreement cum assignment in such circumstances constitute an equitable mortgage, the Federal Court in *PhileoAllied* proceeded to consider if the assignee was required to obtain a court order before disposing of the property in the case where the assignor failed to repay the loan. On this issue, Abdul Malek Ahmad FCJ (now PCA) held:

> All things considered, we were more inclined to agree with learned counsel for the appellant in particular with his submission that in the absence of any statutory provisions or common law requiring the equitable mortgagee to obtain a court order to realize its security under an absolute assignment of rights to land, the court should give effect to and recognize the contractual rights as determined between the vendor and the purchaser.

It is evident from the judgment in *PhileoAllied* that an equitable mortgagee does not require a court order to realize the security. The English cases referred to earlier are very different from what occurs in the Malaysian context in cases such as this. As pointed out earlier, the defendant in this case who is the assignor and also the mortgagor does not have the legal estate in the property. That legal estate remains in the developer from whom the property is purchased and remains so even when subdivision is complete and an individual title is issued. The defendant only acquires the legal estate when he takes a transfer of the property from the developer thereafter. Until the transfer takes place, the defendant only has an equitable or beneficial interest that arises from the sale and purchase agreement he has with the developer. It is that equitable interest or equitable estate that has been mortgaged. But it is of crucial importance not to lose sight of the fact that the equitable interest or estate in these cases is something quite different from the interest or estate created in the English cases referred to earlier. In all cases where there is an assignment of the rights interest and title under a sale and purchase agreement, the assignment is an assignment of a chose in action. It follows that the equitable mortgage in this case comprises of nothing more than a mortgage of the chose in action arising out of the sale, and purchase agreement between the defendant and the developer.

An absolute assignment of a chose in action, as s. 4(3) of the Civil Law Act 1956 provides, takes effect in law to pass and transfer the legal right to the chose in action to the assignee. It follows that an assignee or equitable mortgagee in these cases no longer has a legal right to the chose in action until and unless there is a revocation and reassignment of the chose to him.

In the English cases, the mortgagor is the owner of the fee and it may be questionable if an equitable mortgagee may convey the legal estate when exercising the power of sale. This results from the dilemma whether the mortgagee may convey what he does not have vested in him – a dilemma from which there can be escape by the inclusion of a power of attorney or a declaration of trust. In our local context, legal title (the English equivalent of the legal estate) vests with the developer until the property is transferred to the assignor or mortgagor. The assignor or mortgagor has a right to require a transfer of that legal title from the developer once title has been issue. This right is the chose in action that has been absolutely assigned or transferred to the assignee or mortgagee. The mortgagee then when exercising the power of sale assigns or transfers not the legal title to the subsequent purchaser but the chose in action that enables the purchaser to require the developer to transfer the legal title or estate to him directly.

Is There Any Change In The Legal Position Once Title Is Issued?

In *PhileoAllied* the Federal Court ruled that an assignee, being an equitable mortgagee, could exercise the power of sale without recourse to the courts in the event the assignor breaches the terms of repayment of the loan facility. The Federal Court in that case, however, was not required to consider if the assignee could exercise the power of sale once individual or strata title has been issued in respect of the assigned property. In such cases, does the assignee lose the power of sale he has as an equitable mortgagee? Is he obliged to perfect the transfer of the property, register a National Land Code charge and thereafter obtain a judicial sale of the property?

The law in relation to absolute assignments is clear. An absolute assignment is an equitable mortgage and the essence of a mortgage is that there is a transfer of the ownership to the mortgagee. The journals are also replete with cases where courts have ruled that an absolute assignment serves to transfer absolutely the legal right to the chose in action to the assignee.

There is no statute or rule in common law that once an individual title or strata title is issued, the absolute assignment is extinguished. Likewise, there is nothing to say that the assignee must extinguish the assignment by ensuring the assignor takes a transfer of the property and creates a charge in favour of the lender. In the absence of any statutory provision or rule of common law, the court must give effect to the intention of the parties that is reflected in

the contractual provisions of the assignment. This is plain from the judgment of Abdul Malek Ahmad FCJ in *PhileoAllied* where his Lordship said that in such cases "the court should give effect to and recognize the contractual rights."

Unless the contractual provisions in the assignment provide that it is extinguished upon the issuance of an individual or strata title, the assignment is not extinguished. Unless the assignment imposes an obligation on the assignee to ensure that title is transferred to the assignor and a charge is registered, the court cannot impose such an obligation on the assignee in the absence of statutory power or common law enabling the court to do so. In *Ooi Chin Nee*, the ordinary grammatical meaning that attaches to section 4.05 of the assignment in that case is simply that the assignor is obliged to take a transfer of the property and execute a charge in favour of the assignee once strata title is issued. It certainly does not impose any obligation on the assignee to see to the creation of a statutory charge. In addition, to say that that section imposes an obligation on the assignee to see to the creation of a statutory charge once strata title is issued unduly burdens the assignee and increases the expenses resulting directly in the assignor's debt to the assignee ballooning. In most, if not all cases, when title is issued, the following circumstances would be prevailing:

1. The assignor having dutifully complied with his obligations to repay the loan, takes a transfer of the property, creates a charge in favour of the bank and continues thereafter with his obligations to the bank. If, in the later years, a default occurs, the bank naturally enforces the registered charge to obtain a judicial sale of the property; or

2. The assignor is in breach, and with the realization that the bank is after him for payment, either disappears without informing the bank of any forwarding address or simply refuses to co-operate with the bank.

In the latter case, if an obligation were imposed on the bank to see to the creation of a statutory charge, the bank would be required to attempt to locate the assignor. If the assignor can be located, it would not be surprising if the assignor refuses to co-operate with the bank and execute the relevant documents to effect the tranfer and create the charge. If that were the case and it would probably be so, the bank may execute the relevant documents itself if it had the foresight to extract a power of attorney from the assignor at the beginning of the transaction. If the assignor did not appoint the bank as attorney, the bank would have little choice but to seek for an order of specific performance. Once the order is made, the registrar of the court may stand in place of the assignor to execute the relevant documents. But of

paramount importance is the fact that precious time is lost following through these processes, unnecessary expenses would have to be incurred by the bank and charged back to the assignor's account, and interest on the debt would be mounting throughout this time. After having gone through this entire process, the financier still may not be able to file an originating summons for an order for sale under O. 83 of the Rules of the High Court 1980 – not at least until the title deed and duplicate charge returns from the relevant land registry. Both documents are necessary before the court can auction off the property, as the documents have to be lodged with the Registrar of the High Court prior to the auction.

In light of this, it can hardly be said that imposing such an obligation on the bank is necessary to ensure that the assignor is accorded the protection provided in the National Land Code 1965, some of which Edgar Joseph Jr FCJ so ably summarized in *Kimlin Housing Development Sdn. Bhd. v. Bank Bumiputra Malaysia Bhd. & Ors* [1997] 3 CLJ 274. On the contrary, it only serves to place the assignor in greater, disadvantage. It is common knowledge that the value of immovable security does not appreciate at a level to match the interest being compounded and accumulating on the loan. It is not surprising that in many cases, the amount outstanding far exceeds the amount realized from the sale of immovable securities. That simply results from the fact that realizing immovable securities takes time and in the interim, interest continues to accumulate. Creating legal obstacles or unnecessary procedural impediments for an equitable mortgagee to realize the security is in my considered view unsound as it only serves to expose both lender and borrower to greater risks rather than bring any commercial benefit to either.

For the reasons adumbrated above the question whether a lender having an assignment may, without obtaining an order of sale from the court, realize his security consisting of immovable property in respect of which there is an issue document of title but no registered charge must be answered in the affirmative and I accordingly make an order in terms of the declarations sought as per encl. 2.